STATEMENT

of

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for the

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

and the

AMERICAN SOCIETY OF NEWSPAPER EDITORS

Before the

Subcommittee on Legislation
of the
Permanent Select Committee on Intelligence
U.S. House of Representatives

on HR 3460 and HR 4431

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Mr. Chairman and members of the Committee, my name is Charles Rowe and I am the editor and co-publisher of the Free Lance-Star in Fredericksburg, Virginia. I am testifying today on behalf of the American Newspaper Publishers Association and the American Society of Newspaper Editors.

The American Newspaper Publishers Association is a nonprofit membership corporation organized under the laws of the Commonwealth of Virginia. Its membership consists of nearly 1400 newspapers accounting for more than 90 percent of U.S. daily and Sunday circulation. Many non-daily newspapers also are members.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 850 men and women who hold positions as directing editors of daily newspapers throughout the United States.

Mr. Chairman, at the outset, I want to thank you for affording me the opportunity to provide our views on legislative proposals to exempt certain CIA operational files from the search and review provisions of the Freedom of Information Act (FoIA).

First let me say that ANPA and ASNE support the existing FoIA. The act serves as tangible proof in our society that the spirit of open government which pervaded the founding of this great nation still lives; that this representative government still cherishes the concepts of a free society made up of free people who are entitled to

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information about how their government operates and how its decisions are made. When editors and publishers defend the FoIA, we do so not solely in our personal interest, but in the interests of the individual citizens of this free society. Naturally, it concerns us when any proposal is made to weaken the FoI Act.

Over the past few years there has been considerable debate about the problems faced by the CIA in complying with FoIA. In an October 1, 1982 letter to the Editor of the New York Times, CIA Director William Casey stated that "there is an inherent incompatibility in applying an openness in government law to intelligence agencies whose mission must be carried out in secrecy."

There are two points which must be remembered in looking at the CIA and its problems with the FoIA. First, the existing statute recognized exceptions required to strike the delicate balance between openness in government and the need for a degree of secrecy in our intelligence operations. Exemptions 1 and 3 of the FoIA, in conjunction with Section 102(d)(3) of the National Security Act of 1947, protect classified national security information and intelligence sources and methods from disclosure. Courts have given great deference to the CIA in accordance with the aforementioned exceptions.

The CIA has not been forced to release information when it believed that such release would harm national security.

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Secondly, the CIA has stated repeatedly that the existence of FoIA deters foreign intelligence sources from cooperating with the CIA. The CIA might well devote more effort to educating the foreign intelligence world and its sources on the statutory protections provided by FoIA and the National Security Act.

For example, it could reiterate abroad Admiral Stansfield Turner's statement, made to the 1980 ASNE convention in Washington, D.C., in which he stated:

> "...we have not lost a case in the court when we have claimed that something was classified and therefore could not be released."

Mr. Chairman, we are pleased that the CIA no longer seeks a full exception from the FoIA. At the same time, representatives of the newspaper business have not rejected out of hand the CIA's pleas for relief from the FoIA search and review requirements. Over the past few years, we have met with the CIA several times to develop a dialogue on this issue.

The two press associations which I represent here today carefully monitored Senate consideration of S 1324 from its introduction. We were concerned then that the legislation could deny information to the public which is now available. A degree of concern remains with us.

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The version of S 1324, passed by the Senate, which is similar to HR 4431, is much improved over the original bill. These improvements include: a judicial review provision, a requirement that the file designation be reviewed at least every 10 years, and continued search and review requirements for information in designated files that was reviewed and relied upon in an official investigation. Additionally, under S 1324 and HR 4431, the CIA director is required to promulgate regulations concerning the designation of CIA operational files.

However, even with the provisions for judicial review and implementing regulations contained in the Senate bill, this legislation vests the CIA with a great deal of power to subvert the spirit of public access to information. At this stage, we do not know the percentage of CIA files which will be designated by the Director as "operational". The public's primary defense against overzealous secrecy lies with this committee's oversight responsibilities, together with the House Government Operations Committee and those of your Senate colleagues. Misfiled information, which currently would be subject to search and review, may never see the light of day under this legislation.

As a representative of the newspaper business, I do not pretend to be an expert on the intricate workings of the CIA. However, I urge the committee, in its deliberations on HR 3460 and HR 4431, to take a fresh and careful look at the question of whether in fact this legislation even inadvertently may result in denial of information

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currently available under FoIA. I hope that anything passed by Congress to relieve processing burdens won't also result in putting additional information under wraps.

Following Senate hearings on S 1324, in response to a request by Senator Leahy, the CIA submitted a list which indicated the impact of S 1324 on pending cases. According to this list, approximately 16 cases may involve information in operational files, which under S 1324 would be exempt from search and review. It is not immediately apparent why certain cases fall within or without the new exemption. These cases should be carefully reviewed by this committee to fully understand the definition of "operational files" that will be employed by the CIA. We ask that you also give some careful thought as to whether this definition might easily be further broadened by some future CIA director.

Mr. Chairman, I would like to call the committee's attention to three specific provisions of HR 4431 that need improvement.

Judicial Review

S 1324, as introduced, did not contain a judicial review provision. Neither does HR 3460. In testimony before the Senate Intelligence Committee, we joined other witnesses in calling for the inclusion of such a provision. At that time, we stated, and I reiterate here today, that a major and vital principle of FoIA is the right

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to judicial review. The Senate-passed version of S 1324 does include a judicial review provision, but we believe it needs to be strengthened.

Under S 1324, in order to secure court review, an individual would have to have personal knowledge or otherwise admissible evidence of an improper designation of specific files or improper placement of records in designated files. The committee should carefully examine the difficulty which a requestor will have in getting into court under this provision.

Even where a prima facie showing is made, under the provisions of the bill court review is limited to review of the CIA's sworn response. In order to be effective, the judicial review provision should empower the court to independently to review the file, in camera if necessary, to determine whether a proper designation was made. This is in accordance with the judicial review provision contained in FoIA, which requires de novo review of the withholding of classified material.

Covert Action/Special Activity Files

Mr. Chairman, probably the most controversial of CIA activities has been covert action operations (or special activities) which involve influencing events rather than just gathering information. HR 3460, HR 4431 and S 1324 all provide that the CIA will continue to

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search and review operational files about CIA covert action operations (or special activities), if the fact of the existence of the activity is not exempt from the FoIA. The net effect of this provision would appear to deny search and review of special activity files. Presumably, all covert action operations are classified, and thus fall under Exemption 1 of the FoIA. Only in those rare cases, where an official of the Executive Branch has officially acknowledged the existence of the operation, would the search and review provision still be applicable.

Operational Files Subject to Official Investigation

All three legislative proposals (HR 3460, HR 4431 and S 1324 as passed) also provide for continued search and review of information in designated files which were reviewed and relied upon in an official investigation for illegality or impropriety in the conduct of an intelligence activity. The provision does not address cases where the investigators merely sample a relevant file, overlook a file through inadvertance or where the information is withheld from investigators. The provision should be strengthened to assure that all information relevant to the subject of an investigation remains accessible. While the report accompanying the bill addresses these issues, mere report language in our opinion is inadequate. Report language is not binding, and these loopholes should be addressed in the statute itself.

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Backlog of Requests/Expedited Review

Journalists have experienced excessive delays in CIA processing of their FoIA requests. The average time for processing a request is about two years. Advocates of S 1324 argue that passage of the bill will result in eradication of the backlog.

The current backlog serves to deny information on a timely basis, but while elimination of the backlog is desirable, it should not be at the expense of denial of information forever. As we have previously stated, this issue should be carefully examined by the committee. Further, we do not believe that any of the legislative proposals, including S 1324 and its report language, guarantee that the goal of elimination of the backlog will be achieved. When the CIA was questioned on this point at the Senate Intelligence Committee hearing, the response was troublingly vague. The report accompanying S 1324 contains helpful language, but there is nothin to prevent the CIA from reallocating its resources elsewhere.

If, in fact the committee goes forward with legislation to exempt certain operational files, then at a minimum, the legislation should provide the public with streamlined processing of FoIA requests which do not require extensive search, review and coordination.

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Conclusion

Our nation's newspapers recognize the need for a degree of secrecy in our intelligence operations. However, this must be balanced against the principle of open government in our free society. As Justice Black stated in the Pentagon Papers case, New York Times v. United States, 403 U.S. 713, 724 (1971),

> "Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health."

The amendments made to S 1324, which are substantially embodied in HR 4431, clearly improve the bill. However, we urge each member of the committee and your staff to carefully review again the important points raised here. The balance between secrecy and openness is for you to strike.

As the committee with oversight responsibility for the CIA, you have a special responsibility. You have access to secret information on CIA operations which is not available to the public. In the event that this legislation is enacted, the public must rely on you to oversee implementation and to safeguard the public's right to an open government.

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